FILED
MAY 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DAVID GALCERAN and ED TEEL,
Petitioners,
vs.
EDWARD JOSEPH HARDING,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DE WITT W. CLINTON, County Counsel
County of Los Angeles
S. ROBERT AMBROSE, Assistant County Counsel
PATRICK T. MEYERS, Principal Deputy County Counsel*

648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974 -1900

Attorneys for Petitioners
DAVID GALCERAN and ED TEEL

*Counsel of Record

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

QUESTIONS PRESENTED

1. Whether a Federal Court of Appeals may save an untimely civil rights action by fashioning a federal tolling rule from a statutory provision within a state's tort claims act, when the act has consistently been held by federal and state decisions to be inapplicable to actions under 42 U.S.C. Section 1983?

2. Whether a state statute may be fairly construed as inconsistent with federal law under 42 U.S.C. Section 1988 when it is confined in application to actions under a state tort claims act?

PARTIES TO THE PROCEEDING

All parties to the proceeding below are listed in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING. ii

TABLE OF AUTHORITIES. v

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 10

I. THE COURT OF APPEALS HAS FASHIONED A FEDERAL TOLLING RULE BY MEANS WHICH CONFLICT WITH SETTLED LINES OF DECISION OF THIS COURT AND OF THE NINTH CIRCUIT. 10

II. THE STATUTORY CONSTRUCTION EMPLOYED BY THE COURT OF APPEALS PRESUMED THAT THE STATE TOLLING RULE APPLIED, DISREGARDED LEGISLATIVE HISTORY AND JUDICIAL DECISIONS TO THE CONTRARY, AND CONFLICTED WITH THE TEACHING OF THIS COURT. 18

CONCLUSION. 21

Page

LIST OF APPENDICES

APPENDIX A

OPINION, UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, FILED NOVEMBER 16, 1989 . . . . . A-1

APPENDIX B

MEMORANDUM OF DECISION AND ORDER, UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, FILED JUNE 28, 1988 . . . B-1

MEMORANDUM OF DECISION AND ORDER, FILED SEPTEMBER 2, 1988 . . B-12

CIVIL MINUTES — GENERAL, DATED OCTOBER 16, 1987. . . . . B-15

APPENDIX C

ORDER DENYING REHEARING, UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, FILED FEBRUARY 14, 1990. . . . . C-1

APPENDIX D

THE CIVIL RIGHTS ACT OF 1871, 42 U.S.C. SECTION 1983 . . . . . D-1

THE CIVIL RIGHTS ACT OF 1866, 42 U.S.C. SECTION 1988 . . . . . D-2

APPENDIX E

CALIFORNIA TORT CLAIMS ACT OF 1963, CALIFORNIA GOVERNMENT CODE SECTION 945.3 . . . . . E-1

APPENDIX F

CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 340 . . . . . F-1

TABLE OF AUTHORITIES

Page

Federal Cases

Board of Regents v. Tomanio
446 U.S. 478 (1980) 7, 8, 10-13, 16-18

Burnett v. Grattan
468 U.S. 42 (1984). 18, 20

Cabrales v. County of Los Angeles
644 F. Supp. 1352 (C.D. Cal. 1986) 4, 19

Del Percio v. Thornsley
877 F.2d 785 (9th Cir. 1989). 19

Donovan v. Reinbold
433 F.2d 738 (9th Cir. 1970). 15

Felder v. Casey
__ U.S. __ 108 S.Ct. 2302,
101 L.Ed.2d 123 (1988) 6

Guillory v. County of Orange
731 F.2d 1379 (9th Cir. 1984) 15

Hardin v. Straub
__ U.S. __, 109 S.Ct. 1998,
104 L.Ed.2d 582 (1989) 12

Harding v. Galceran
889 F.2d 906 (9th Cir. 1989). 6-9, 14

Johnson v. Railway Express Agency, Inc.
421 U.S. 454 (1975) 11, 12, 17

Page

Major v. Arizona State Prison
642 F.2d 311 (9th Cir. 1981). 13

Mangels v. City of Orange
678 F. Supp. 1452 (C.D. Cal.1988) 5, 20

Martinez v. State of California
444 U.S. 277 (1980) 15

May v. Enomoto
663 F.2d 164 (9th Cir. 1980). 13, 15

Ney v. State of California
439 F.2d 1285 (9th Cir. 1971) 15

Robertson v. Wegmann
436 U.S. 584 (1978) 12

Smith v. Cremins
308 F.2d 187 (9th Cir. 1962). 14

Stephan v. Dowdle
733 F.2d 642 (9th Cir. 1984). 13

Usher v. City of Los Angeles
828 F.2d 556 (9th Cir. 1987). 19

Willis v. Reddin
418 F.2d 702 (9th Cir. 1969). 15

Wilson v. Garcia
471 U.S. 261 (1985) 4, 10, 11, 16-19

Page

State Cases

Estate of McDill
14 Cal.3d 831, 122 Cal.Rptr. 754,
537 P.2d 874 (1975) 16, 21

McAlpine v. Superior Court
209 Cal.App.3d 1,
257 Cal.Rptr. 32 (Ct. App. 1989) 14

McMartin v. County of Los Angeles
202 Cal.App.3d 848, 8, 13
249 Cal.Rptr. 53 (Ct. App. 1988) 14, 20

Mohlmann v. City of Burbank
179 Cal.App.3d 1037
225 Cal.Rptr. 109 (Ct.App. 1986) 19

Rossiter v. Benoit
88 Cal.3d 706,
152 Cal.Rptr. 65 (Ct. App. 1979) 15

Williams v. Horvath
16 Cal.3d 834, 129 Cal.Rptr. 453,
548 P.2d 1125 (1976) 6, 15

Constitution

United States Constitution
Supremacy Clause, article VI, clause 2. . . . 2, 6-9
First Amendment 3
Fourteenth Amendment 4

Page

Federal Statutes

United States Code
28 U.S.C. Section 1254(1) 2
42 U.S.C. Section 1983 . . . . . *passim*
42 U.S.C. Section 1988 . . . . . .12, 18

State Statutes

California Code of Civil Procedure
Section 340(3) 4, 5, 7, 8, 10, 16, 19
Sections 312-365 11
Section 352 19

California Tort Claims Act,
California Government Code
Section 810, *et. seq.* 4, 12, 14
Section 900, *et. seq.* 15
Section 945.3 . . . . . 5-9, 12-14, 16, 19-21

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

DAVID GALCERAN and ED TEEL,
Petitioners,
vs.
EDWARD JOSEPH HARDING,
Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioners, David Galceran and Ed Teel, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the proceeding on November 16, 1989.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 889 F.2d 906 and is reprinted in the Appendix A hereto, pages A-1 to A-9, *infra*.

The memoranda of decision and orders of the United States District Court for the Central District of California (Rymer, D.J.) have not been reported. They are

reprinted in the Appendix B hereto, pages B-1 to B-11, *infra* and pages B-12 to B-14, *infra*.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Ninth Circuit were entered on November 16, 1989. The Court of Appeals denied a timely petition for rehearing and rejected the suggestion of rehearing en banc on February 14, 1990. Please see Appendix C, page C-1, *infra*.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, article VI, clause 2:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The statutory provisions involved are respectively set forth in Appendices D, E and F, pages D-1 to F-1, as follows:

The Civil Rights Act of 1871, 42 U.S.C. Section 1983

The Civil Rights Act of 1866, 42 U.S.C. Section 1988

California Tort Claims Act of 1963, California Government Code Section 945.3

California Code of Civil Procedure, Section 340

STATEMENT OF THE CASE

Alleging federal jurisdiction under 42 U.S.C. Section 1983, the respondent commenced this damage action against the petitioners, individually and in their official capacities as Sheriff's deputies for the County of Los Angeles, on May 1, 1987. His allegations related to an incident which took place at the San Dimas Sheriff's station on October 10, 1984, in which the respondent was physically ejected from the station after creating a disturbance. A short time later that day, the respondent made threatening and abusive telephone calls to the station.

On October 11, 1984, a misdemeanor complaint was filed, charging the respondent with disturbing the peace, obstructing a peace officer in the performance of his duties, challenging a person in a public place to fight, and making threatening telephone calls. On May 2, 1986, the respondent was acquitted of pending criminal charges.

Nearly a year later, the respondent alleged in his first cause of action that petitioners used excessive force in ejecting him from the Sheriff's station and violated his right to freedom of speech under the First and

Fourteenth Amendments to the United States Constitution. In his second cause of action, he alleged that his physical ejection from the station by petitioners was in furtherance of a conspiracy to deprive him of equal protection of the laws or equal privileges and immunities thereunder.

The respondent was never held in custody on criminal charges arising from the incident on October 10, 1984. He never presented a claim to the County of Los Angeles under the California Tort Claims Act, California Government Code Section 810, *et seq.*, in connection with the incident. His complaint alleged claims solely under 42 U.S.C. Section 1983. No pendent state law claims were alleged. See Appendix B, page B-15 to B-16, *infra.*

Petitioners moved for summary judgment on various grounds, including their affirmative defense that the first two causes of action were barred by the one-year limitation period set forth in California Code of Civil Procedure Section 340(3), which governs actions under 42 U.S.C. Section 1983 in California. See Appendix F, page F-1, *infra.* The district court granted summary judgment on the ground that the first two causes of action were barred by the statute of limitations. See Appendix B, pages B-4 to B-5, *infra.*

In view of the fact that the respondent's first two causes of action accrued before *Wilson v. Garcia*, 471 U.S. 261 (1985) was decided, the district court had determined that the causes of action accrued April 17, 1986, one year after the *Wilson* decision, in accordance with *Cabrales v. County of Los Angeles*, 644 F. Supp. 1352, 1356 (C.D. Cal. 1986). Having commenced his action on May 1, 1987, respondent's first two causes of action were thus untimely. See Appendix B, pages B-4 to B-5, *infra.*

Respondent unsuccessfully argued before the district court that a provision in California Government Code Section 945.3 tolled the running of the limitation period under California Code of Civil Procedure Section 340(3). This statute was added to the California Tort Claims Act in 1981 and was amended in 1983 to provide principally that no person charged with a criminal offense may bring a civil action for damages against a peace officer or his public employer based on the peace officer's conduct in connection with the pending criminal charge. Among other ancillary provisions, it further provides that any applicable statute of limitations is tolled during the pendency of the charges in state trial courts. See Appendix E, page E-1, *infra*.

The 1983 amendment to statute made clearer that it did not relieve a potential civil litigant from complying with claim presentation requirements under the Act. Petitioners maintained below that provisions of the California Tort Claims Act are inapplicable to actions under 42 U.S.C. Section 1983.

Acknowledging that the tolling of the statute of limitations for an action under 42 U.S.C. Section 1983 was usually governed by state law, the district court ruled that the tolling provision within California Government Code Section 945.3 nonetheless did not apply because substantive policy considerations underlying 42 U.S.C. Section 1983 would otherwise be defeated. Relying on *Mangels v. City of Orange*, 678 F. Supp. 1452 (C.D. Cal. 1988) as authority for this proposition, the district court further noted that there was nothing in the record to suggest that respondent's failure to commence his action was due to California Government Code Section 945.3. See Appendix B, page B-5 and note 1, *infra*.

In considering additional arguments by respondent, the district court later observed that the record also did

not support his assertion that peace officers generally press for the filing of baseless criminal charges against potential civil plaintiffs. But, to the extent that such an assertion was true, the district court noted:

> ". . . the rule adopted by this court in *Mangels v. City of Orange*, 678 F.Supp. 1452 (C.D. Cal. 1988) should have a salutory [*sic*] effect by preserving the availability of accused citizen's civil rights." (Appendix B, page B-13, note 2, *infra*)

On September 21, 1988, the respondent filed a notice of appeal. He thereafter prosecuted his appeal only as to his first and second causes of action, which were directed solely at petitioners.

In its opinion, filed November 16, 1989, the Court of Appeals for the Ninth Circuit agreed that, unless the time was tolled, respondent's first two causes of action were time-barred. It then held that they were saved by the tolling provision in California Government Code Section 945.3.

Although the Ninth Circuit opinion did not discuss the California Tort Claims Act, it relied on *Felder v. Casey*, __ U.S. __, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), which involved a challenge to pre-litigation requirements of the Wisconsin statute governing liability of public entities and employees, for the proposition that under the Supremacy Clause of the Federal Constitution, such state law must yield when there is a conflict with valid federal law. *Harding v. Galceran*, 889 F.2d 906, 908 (9th Cir. 1989) (Appendix A hereto, *infra*). Inasmuch as *Williams v. Horvath*, 16 Cal.3d 834, 129 Cal.Rptr. 453, 548 P.2d 1125 (1976), has stood for essentially the same proposition in California, petitioners had argued below that provisions of the California Tort

Claims Act have generally not been applied by federal and state courts to actions under 42 U.S.C. Section 1983. Petitioners have consistently taken the position below that California Government Code Section 945.3 is confined in application to actions under the Tort Claims Act and does not apply to actions under 42 U.S.C. Section 1983.

The Ninth Circuit viewed the district court as having decided that:

> ". . . because the prohibitory provision of section 945.3 conflicted with the policies behind section 1983, Harding's claims were not tolled by section 945.3's tolling provision." *Harding v. Galceran, supra*, 889 F.2d at 908. (Appendix A hereto, *infra*)

Disagreeing with this proposition, the Ninth Circuit held that, although the prohibitory provision in California Government Code Section 945.3 fell under the Supremacy Clause, the tolling provision did not similarly fall and thus tolled the statute of limitations as to respondent's first two causes of action under 42 U.S.C. Section 1983. *Id.*

The Ninth Circuit opinion stated that federal courts look to state law to determine the application of tolling rules under *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). Referring to California Code of Civil Procedure Section 340(3), the opinion concluded that:

> ". . . the one-year limitation period applied to section 1983 claims in California is interrelated to the policies behind the tolling provision expressed in section 945.3." *Harding v. Galceran, supra*, 889 F.2d at 908.

The Ninth Circuit opinion discussed one California appellate opinion in connection with the objectives of the California legislative in enacting California Government Code Section 945.3. *McMartin v. County of Los Angeles*, 202 Cal.App.3d 848, 249 Cal.Rptr. 53 (Ct. App. 1988). These objectives were described as eliminating civil damage actions as plea bargaining levers in state criminal proceedings and preventing their use as a discovery device for criminal defense preparations. *Id.*, 202 Cal.App.3d at 854-856, 248 Cal.Rptr. at 55-56.

Notwithstanding that the prohibitory provisions of California Government Code Section 945.3 cannot apply in the face of the Supremacy Clause, the Ninth Circuit opined that these objectives can be served by tolling the statute of limitations for actions under 42 U.S.C. Section 1983 while criminal charges are pending against a potential plaintiff. If the statute of limitations was not tolled for such actions in these specific circumstances, the objectives and the interrelationship perceived by the Ninth Circuit between California Code of Civil Procedure Section 340(3) and the tolling provision of California Government Code Section 945.3 would go unserved. *Harding v. Galceran, supra*, 889 F.2d at 909 (Appendix A hereto, *infra*).

In finding no inconsistency under *Board of Regents v. Tomanio, supra*, between the perceived purposes of the tolling provision and the policies behind 42 U.S.C. Section 1983, the Ninth Circuit gave four ways in which these policies are served by tolling the statutory period for actions under 42 U.S.C. Section 1983 in the circumstances when criminal charges are pending against the potential plaintiff. First, more time is thereby afforded to commence the action. Second, the additional time serves the policies of deterrence and compensation.

> "Third, since federal law requires this court to apply state tolling rules, application of section 945.3's tolling provision ensures consistent adjudication in state and federal courts." *Harding v. Galceran, supra*, 889 F.2d at 909.

The final way, which the Ninth Circuit opinion deemed most important, was that tolling the statute of limitations would encourage a criminal defendant to await the outcome of the criminal action before commencing an action under 42 U.S.C. Section 1983. It was suggested that this would reduce litigation of civil rights claims. *Harding v. Galceran, supra*, 889 F.2d at 909.

Reversing the summary judgment as to respondent's first two causes of action and remanding these causes to the district court, the Court of Appeals for the Ninth Circuit summarized that, under the Supremacy Clause, the prohibitory provision could not have prevented the respondent from commencing his civil rights action against the petitioners while criminal charges were pending against him. But the tolling provision within California Government Code Section 945.3 passed muster under the Supremacy Clause and tolled the time during which criminal charges were pending against petitioner, making his first two causes of action timely.

Petitioners filed a timely petition for rehearing with a suggestion for rehearing en banc. They urged that a material point of law was overlooked or misapprehended in the Ninth Circuit judgment and opinion. Petitioners asserted on petition for rehearing that the special tolling provision within California Government Code Section 945.3 is not one of the coordinate tolling provisions for the statute of limitations governing federal civil rights

action, which provisions are set forth in the California Code of Civil Procedure.

Petitioners further argued that, in construing the special tolling provision within the California Tort Claims Act to interrelate to California Code of Civil Procedure Section 340(3), the Ninth Circuit opinion appeared to conflict with decisions of this Court, as well as other decisions of the Ninth Circuit. The petition for rehearing was denied on February 14, 1990.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS HAS FASHIONED A FEDERAL TOLLING RULE BY MEANS WHICH CONFLICT WITH SETTLED LINES OF DECISION OF THIS COURT AND OF THE NINTH CIRCUIT

The decision herein and means by which the Court of Appeals for the Ninth Circuit reached the decision significantly depart from decisions and principles established by this Court in *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) and *Wilson v. Garcia* 471 U.S. 261 (1985). The *Tomanio* and *Wilson* decisions had served federal interests of uniformity, certainty, and minimization of unnecessary litigation which this recent Ninth Circuit decision threatens to undermine. Just as the search for the most appropriate statute of limitations to govern federal civil rights action in the various circuits appeared over, the Ninth Circuit appears disposed to apply any available tolling provision to toll that statute in California. The considerable and desirable degree of

predictability wrought by the *Tomanio* and *Wilson* decisions in this area of civil rights law has been unnecessarily impaired by the decision herein. Moreover, the means used by the Ninth Circuit to reach its decision have included ignoring legitimate state interests as well as settled law in federal and state courts of the Ninth Circuit. All these factors warrant a further consideration of the federal questions involved by this Honorable Court.

In *Board of Regents v. Tomanio, supra*, 446 U.S. at 483-484, this Court held that, in borrowing the most appropriate state statute of limitation to govern a federal civil rights action, the federal courts should apply the coordinate state tolling rules for that statute. The approach essentially prescribed by the Court was to identify the coordinate rule of tolling once the appropriate statute of limitations was determined and then to determine whether that rule was inconsistent with federal law. The Court found that New York had codified the limitation of actions and the coordinate tolling rules together. *Id.* at 486. So has California in California Code of Civil Procedure Sections 312 to 365. Noting that the New York statute had codified various common law tolling rules for infancy, insanity, imprisonment, and the defendant's absence from the state, this Court nonetheless found no coordinate state tolling rule in the New York Civil Practice Law which could toll Ms. Tomanio's federal civil rights action under the circumstances.

This Court emphasized that, as applied to actions under 42 U.S.C. Section 1983, a state statute of limitations and its coordinate tolling rules are "binding rules of law in most cases." *Id.* at 484. The Court further observed that the state policies of repose underlying statutes of limitation were not generally disfavored in federal law. *Id.* at 488. Relying on *Johnson v. Railway*

Express Agency, Inc., 421 U.S. 454 (1975) and *Robertson v. Wegmann*, 436 U.S. 584 (1978), the Court concluded essentially that the lack of a coordinate state tolling rule fitting Ms. Tomanio's circumstances was not inconsistent with the provisions of 42 U.S.C. Section 1983.

State law had been acknowledged to be the primary, though not the exclusive, guide for federal courts in this area by *Johnson, supra*, 421 U.S. at 465. *See* 42 U.S.C. Section 1988 (Appendix D, page D-2, *infra.*) Thus guided, this Court in *Tomanio, supra*, preferred to follow the "often complex combination of limitations and tolling provisions" actually enacted by the state, rather than an ad hoc federal rule of tolling created by the Federal Court of Appeals. *Id.* at 491-492.

While the Ninth Circuit decision herein purported to interpret a state statute having apparent reference to respondent's circumstances, *i.e.* a person charged with criminal offenses, the interpretation has essentially created an ad hoc federal rule of tolling not unlike that created by the Second Circuit in the *Tomanio* case. Recently, this Court described that ad hoc federal rule in *Tomanio* as "not contained among the tolling provisions the state legislature had codified with its limitations periods." *Hardin v. Straub*, __ U.S. __, 109 S.Ct. 1998, 2001, 104 L.Ed.2d 582 (1989). Neither has California Government Code Section 945.3 been codified with the general statutes of limitations set forth in the California Code of Civil Procedure. It is simply not a coordinate tolling rule and neither underlies nor is codified with the general statute of limitations governing actions under 42 U.S.C. Section 1983 in California.

Rather, it is a special tolling rule within a statutory provision of the California Tort Claims Act, California Government Code Sections 810, *et seq.* This special

tolling rule clearly draws its purpose solely from the so-called prohibitory portion of California Government Code Section 945.3. Notwithstanding the purposes claimed for it by the Ninth Circuit after construing away other portions of the statute, the special tolling rule is purely ancillary and truly has no purpose standing alone.

In this respect, the Ninth Circuit opinion introduces a troubling and expansive interpretation of *Board of Regents v. Tomanio, supra.* It appears to reduce *Tomanio* to the proposition that a tolling rule, whatever its source, purpose or application in state statutes, must be applied to actions under 42 U.S.C. Section 1983 when it is not inconsistent with the Constitution or other federal law. In considering an Arizona tolling statute, however, the Ninth Circuit in *Major v. Arizona State Prison*, 642 F.2d 311, 313 (9th Cir. 1981), had stated:

> "A state legislative enactment is not to be literally or mechanically applied by federal courts. Rather, a federal court charged with application of a state law must enlist the aid and guidance provided by that state's courts whose responsibility it is, in the first instance to interpret and construe the statute."

Federal courts are generally bound by a state court's construction of the laws of that state, including state statutes of limitation and tolling provisions for actions under 42 U.S.C. Section 1983. *Stephan v. Dowdle*, 733 F.2d 642 (9th Cir. 1984). *See May v. Enomoto*, 663 F.2d 164 (9th Cir. 1980).

The Ninth Circuit opinion herein only discussed briefly one state appellate opinion, *McMartin v. County of Los Angeles*, 202 Cal.App.3d 848, 249 Cal.Rptr. 53 (Ct. App. 1988), which had upheld the constitutionality of the 1983 amendment to California Government Code

Section 945.3. *Harding v. Galceran, supra*, 889 F.2d at 908-909. This point was not discussed, however, nor was any mention made of the California Tort Claims Act, of which California Government Code Section 945.3 is an integral part. It performs "the same goals as the rest of the claim filing statutes." *McMartin v. County of Los Angeles, supra*, 202 Cal.App.3d at 858, 249 Cal.Rptr. 53. Although the California Supreme Court has not yet construed California Government Code Section 945.3, California courts have recognized it to be "a component of the government tort claims statutes." *McAlpine v. Superior Court*, 209 Cal.App.3d 1, 7, 257 Cal.Rptr. 32 (Ct. App. 1989).

The legislative integration of California Government Code Section 945.3 in the California Tort Claims Act has historical and doctrinal significance to the issues under consideration by this Court. It also underscores the absence of any mention of the Act in the Ninth Circuit opinion.

The California Tort Claims Act was enacted in 1963 and codified in the California Government Code, Section 810, *et seq.* The Act has been long recognized by federal and state courts to set forth statutory remedies and procedures which are separate and independent from those of the Civil Rights Act of 1871, codified as 42 U.S.C. Section 1983. Before passage of the Tort Claims Act in California, it was settled that provisions of the California Code of Civil Procedure governed limitation of actions under 42 U.S.C. Section 1983 in California. *Smith v. Cremins* 308 F.2d 187 (9th Cir. 1962). After passage of the Tort Claims Act, the Court of Appeals for the Ninth Circuit rejected arguments that time limitations for actions under 42 U.S.C. Section 1983 should be governed by the requirements of the Tort Claims Act and concluded that "it would be singularly inappropriate to

fashion a federal procedural detail by any reference to it." *Willis v. Reddin*, 418 F.2d 702, 705 (9th Cir. 1969).

The federal courts had uniformly found provisions of the California Tort Claims Act to be inapplicable to actions under 42 U.S.C. Section 1983 in California. *Martinez v. State of California*, 444 U.S. 277, 284 and n.8 (1980). *Donovan v. Reinbold*, 433 F.2d 738, 741-742 (9th Cir. 1970). *Ney v. State of California*, 439 F.2d 1285, 1287 (9th Cir. 1971). *May v. Enomoto*, *supra*. *Guillory v. County of Orange*, 731 F.2d 1379, 1382 (9th Cir. 1984).

In *Williams v. Horvath*, 16 Cal. 3d 834, 838-842, 129 Cal.Rptr. 453, 548 P.2d 1125 (1976), the California Supreme Court reviewed the earlier federal cases above and relied upon them to hold that the claim provisions of the California Tort Claims Act do not apply to actions under 42 U.S.C. Section 1983. In considering the question whether any provisions of California Government Code Section 900, *et seq.*, applied to actions under 42 U.S.C. Section 1983, the California Court of Appeal in *Rossiter v. Benoit*, 88 Cal.3d 706, 713, 152 Cal.Rptr. 65 (Ct. App. 1979), stated:

> The *Williams* case decided Government Code section 911.2 claims presentation requirement need not be met in order to file an action based on 42 United States Code section 1983. The language is broad enough in our opinion to embrace the proposition that no part of the California Tort Claims Act, including but not limited to the statute of limitations stated therein, is applicable when the federal Civil Rights Act is invoked and so hold.

Prior to the Supreme Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), some basic principles had evolved in the Ninth Circuit with respect to applying California's statutes of limitations to federal civil rights action. The federal courts had not applied *any* such provisions in the California Tort Claims Act to actions under 42 U.S.C. Section 1983. Neither had the state courts. The federal courts have virtually always applied the provisions of the California Code of Civil Procedure in cases involving application of state statutes of limitation to such federal causes of action. So have the state courts. The federal courts found the appropriate statutes of limitations and the coordinate tolling rules codified together in the California Code of Civil Procedure, just as the Supreme Court had found them in the New York Civil Practice Law in *Board of Regents v. Tomanio, supra*, 446 U.S. at 486 n.6. It is also significant that these basic principles were well settled when the California Legislature enacted California Government Code Section 945.3 in 1981 as a new provision of the California Tort Claims Act. *See Estate of McDill*, 14 Cal.3d 831, 839, 122 Cal.Rptr. 754, 537 P.2d 874 (1975).

Wilson v. Garcia, supra, and its progeny should not have eroded these basic principles. Although the *Wilson* decision caused the limitation period to become one year under California Code of Civil Procedure Section 340(3), it did not prescribe a departure from the recognized statutory source for limitations periods and the coordinate tolling rules governing federal civil rights actions in California.

Indeed, the Supreme Court in *Wilson* rejected the petitioners' argument that the statute of limitation set forth in the New Mexico Tort Claims Act was the most appropriate statute to govern federal civil rights actions in New Mexico. Taking into account the numerous and

diverse kinds of Section 1983 claims, the Supreme Court concluded that the state limitation period for general personal injury actions was the most appropriate limitation to be applied to federal civil rights actions. The Court further observed that such actions comprise the greater volume of civil litigation in the state courts, just as they probably did in 1871 when Section 1983 was enacted.

> "It is most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect." *Id.* at 279.

This proposition should also apply to coordinate state tolling rules, based on the Court's view that the state statute of limitations for a particular cause of action is interrelated with the tolling provisions affecting that cause of action. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-464 (1975).

The Ninth Circuit opinion herein departs from the teaching of *Board of Regents v. Tomanio, supra*, and *Wilson v. Garcia, supra*. It also runs counter to federal and state decisions holding provisions of the California Tort Claims Act inapplicable to the actions under 42 U.S.C. Section 1983. The decision herein is contrary to the settled line of decision in the federal courts, holding state or public liability statutory schemes inapplicable to actions under 42 U.S.C. Section 1983.

II

THE STATUTORY CONSTRUCTION EMPLOYED BY THE COURT OF APPEALS PRESUMED THAT THE STATE TOLLING RULE APPLIED, DISREGARDED LEGISLATIVE HISTORY AND JUDICIAL DECISIONS TO THE CONTRARY, AND CONFLICTED WITH THE TEACHING OF THIS COURT

This Court concluded in *Wilson v. Garcia, supra*, 471 U.S. at 275, that 42 U.S.C. Section 1988 may be "fairly construed as a directive to select, in each state, the one most appropriate statute of limitations for all § 1983 claims." See Appendix D, page D-1, *infra*. Although *Board of Regents v. Tomanio, supra*, indicates that the choice of the most appropriate statute of limitation has a definite bearing on the coordinate tolling rules to be applied by federal courts, the same directive may be applied to state tolling rules.

In *Wilson v. Garcia, supra*, this Court followed the analysis under 42 U.S.C. Section 1988 prescribed in *Burnett v. Grattan*, 468 U.S. 42 (1984). The second step of the *Burnett* analysis entailed consideration of the application of state common law, as modified and changed by the constitution and statutes of the forum state. *Id.* at 47. In holding a Maryland state statute governing the limitation of administrative proceedings inapplicable to Section 1983 claims, the Court noted that the third step of the analysis — whether a state rule of decision is inconsistent with the Constitution of federal law — may involve an unnecessary inquiry under the

circumstances of a given case. As an example of where federal courts must undertake such an inquiry, the Court gave the example of a state enacting a statute of limitation specifically applicable to federal civil rights actions. *Id.* at 45, n.15. Petitioners urge that such an inquiry was also unnecessary herein.

Following *Wilson v. Garcia, supra*, the appropriate statute of limitations governing federal civil rights actions in California — California Code of Civil Procedure Section 340(3) — was mandated in 1985. *Cabrales v. County of Los Angeles*, 644 F. Supp. 1352, 1354 (C.D. Cal. 1986). *See Usher v. City of Los Angeles*, 828 F.2d 556 (9th Cir. 1987). *See also Del Percio v. Thornsley*, 877 F.2d 785 (9th Cir. 1989). The statutory language relied upon to establish Section 340(3) as the appropriate statute of limitations was added in approximately 1905. Coordinate tolling provisions had been largely enacted in 1872, *i.e.* California Code of Civil Procedure Section 352.

In 1981, the California Legislature added California Government Code Section 945.3 to the California Tort Claims Act provisions governing actions thereunder against public entities and employees. The primary objectives of the enactment were concededly to eliminate the use of civil damage complaints as plea bargaining levers and to prevent use of civil false arrest suits as a discovery device to inquire into prosecutorial materials and investigative information during the pendency of criminal proceedings. *Mohlmann v. City of Burbank*, 179 Cal.App.3d 1037, 1042, 225 Cal.Rptr. 109 (Ct. App. 1986). Some uncertainty and controversy arose as to whether the original enactment was intended to suspend claim presentation requirements as well as actions under the California Tort Claims Act. *Id.*

Therefore, California Government Code Section 945.3 was amended and clarified in 1983. It is set forth in full at Appendix E, page E-1, *infra*. In holding the amended Government Code Section 945.3 constitutional, the California Court of Appeal stated that it bore a rational relationship to a legitimate state purpose and served "the same goals as the rest of the claim filing statutes." *McMartin v. County of Los Angeles*, 202 Cal.App.3d 848, 858, 249 Cal.Rptr. 53 (Ct. App. 1988). No reported state court case has involved application of Government Code Section 945.3 to an action under 42 U.S.C. Section 1983.

California Government Code Section 945.3 neither applies nor purports to apply by its express terms to actions brought under the federal Civil Rights Acts. *See Burnett v. Grattan, supra*, 468 U.S. at 53, n.15. Although the court in *Mangels v. City of Orange*, 678 F. Supp. 1452, 1454 (C.D. 1988), observed that its language did not limit its scope to state law claims, the Tort Claims Act contains other general references to suits or claims for money or damages, which have not been construed to apply to the federal Civil Rights Acts. Moreover, the Tort Claims Act contains no reference to federal civil rights actions. And the Act has been repeatedly construed by federal and state courts to be inapplicable to such actions.

Other than acknowledging the legislative objectives behind California Government Code Section 945.3, the Court of Appeals for the Ninth Circuit appeared to give little to no consideration to the legislative history and judicial decisions relating to the enactment. In particular, no apparent heed was paid to the fact that the California Legislature must be presumed to have had knowledge of existing judicial decisions construing the California Tort Claims Act when it enacted California

Government Section 945.3 as part of the Act. *Estate of Mc Dill*, 14 Cal.3d 831, 839, 122 Cal.Rptr. 754, 537 P.2d 874 (1975).

The Court of Appeals appears to have presumed, rather than construed, that California Government Code Section 945.3 applies to actions under 42 U.S.C. Section 1983 and that it is interrelated to the statute of limitations governing such actions in California. There is ample authority to the contrary. The statutory construction employed by the Court of Appeals creates a confusing judicial precedent, which may cause even further confusion in other cases. Review by this Honorable Court is respectfully urged by the petitioners.

CONCLUSION

For the reasons stated in this petition, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

DATED: May 14, 1990.

Respectfully submitted,

DE WITT W. CLINTON
County Counsel

S. ROBERT AMBROSE
Assistant County Counsel

By: PATRICK T. MEYERS*
Principal Deputy County Counsel

Attorneys for Petitioners

*Counsel of Record

APPENDIX A

SPECIAL EARTHQUAKE NOTICE

This opinion is being filed while the Clerk's office in San Francisco is closed due to severe earthquake damage. Once the Clerk's office is operational, notices will be placed in legal newspapers throughout the Circuit. At that time parties may seek additional time to file a petition for rehearing if they desire to file one.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD JOSEPH HARDING,
Plaintiff-Appellant,

v.

DAVID GALCERAN; TERRY GINGERICH; LAWRENCE MOSER; JAMES D. CHISIM, et al.,
Defendants-Appellees.

No. 88-6484
D.C. No. CV-87-2782-PAR
OPINION

Appeal from the United States District Court
for the Central District of California
Pamela A. Rymer, District Judge, Presiding

Argued and Submitted
October 3, 1989—San Francisco, California

Filed November 16, 1989

Before: Procter Hug, Jr., Jerome Farris and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Hug

SUMMARY

Statutes of Limitation

Reversing the district court's grant of summary judgment, the court held that Cal. Gov't Code § 945.3's tolling provision applies to toll the limitations period in a civil rights action while criminal actions are still pending against the potential plaintiff.

Within one year after being acquitted of misdemeanor charges, but more than two years after his claim arose, appellant Edward Harding filed a complaint against appellees Los Angeles Deputy Sheriffs, alleging that the Deputies violated 42 U.S.C.§ 1983 by using excessive force and interfering with Harding's first amendment rights. The district court held that Harding's claims were barred by California's one year statute of limitations for personal injury torts. Harding appealed.

[1] State law determines the statute of limitations for claims brought in a section 1983 action. [2] Harding contended that the statute of limitations was tolled pursuant to Cal. Gov't Code section 945.3. This section prevents civil actions against peace officers from being filed while criminal charges are pending against a potential plaintiff and also tolls the statute of limitations on the civil actions until the criminal charges are resolved. [3] Under the Supremacy Clause, U.S. Const. art. VI, cl. 6, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield. The court concluded that the provision of section 945.3 which absolutely prohibits bringing a civil action against a peace officer while criminal charges are pending against the plaintiff is contrary to the purposes of section 1983 and therefore must fall under the Supremacy Clause. [4] The tolling rule, however, is consistent with the objectives behind section 1983 acions and does not fall under the Supremacy Clause. Section 945.3's tolling provision should have been applied to Harding's section 1983 claims.

COUNSEL

Richard C. Harding, Pasadena, California, for the plaintiff-appellant.

Patrick T. Meyers, Principal Deputy Counsel, Los Angeles, California, for the defendants-appellees.

OPINION

HUG, Circuit Judge:

This case involves a dispute between Edward Joseph Harding and Sheriff's deputies David Galceran and Ed Teel (the "Deputies") of the San Dimas Sheriff's substation, Los Angeles, California. The district court found that Harding's claims against the Deputies were barred by the statute of limitations. Because we find that the statute of limitations was tolled, we reverse.

I.

On October 10, 1984, Harding went to the San Dimas Sheriff's substation to pick up a friend who had been arrested. Harding argued with the Deputies at the substation. The Deputies asked Harding to leave and allegedly used excessive force in effecting his departure. After he left, Harding called the Sheriff's substation to complain about the Deputies' actions.

The next day, the Deputies filed a misdemeanor complaint against Harding. The complaint charged Harding with disturbing the peace, obstructing a peace officer in the performance of his duties, challenging a person in a public place to fight, and making threatening phone calls. On May 2, 1986, a jury acquitted Harding of these charges.

On May 1, 1987, Harding filed a complaint against the Deputies. Count 1 of the complaint alleged that the Deputies violated 42 U.S.C. § 1983 by using excessive force and interfering with Harding's First Amendment rights. Count 2 alleged conspiracy to do the same.[1] The district court held that Harding's claims were barred by the statute of limitations and granted the Deputies' motion for summary judgment. That holding is the subject of this appeal.

A dismissal on statute of limitations grounds presents a question of law reviewed *de novo*. *Donoghue v. Orange County*, 848 F.2d 926, 929 (9th Cir. 1988).

II.

[1] Harding's claims are based on the Civil Rights Act, 42 U.S.C. § 1983. State law determines the statute of limitations for claims brought under 42 U.S.C. § 1983. *Wilson v. Garcia*, 471 U.S. 261 (1985). The Court in *Wilson* held the statute of limitations for all section 1983 claims to be the forum state's statute of limitations for personal injury torts. *Id.* at 269. In California, this period is one year. Cal. Civ. Proc. Code § 340(3) (West Supp. 1989).

Harding's claims arose on October 10, 1984. Harding filed his section 1983 claims on May 1, 1987, more than two years after his claims arose, but within one year of his acquittal on the criminal charges. Unless Harding's claims can be saved by a tolling rule, they are time-barred by the statute of limitations. We look to state law to determine the application of tolling doctrines. *Board of Regents v. Tomanio*, 446 U.S. 478, 486-87 (1980).

[2] Harding contends that the statute of limitations was

[1]Harding's complaint also included two malicious prosecution counts, which were dismissed on summary judgment. He does not appeal the dismissal of these claims.

tolled pursuant to Cal. Gov't Code § 945.3 (West Supp. 1989).[2] This section prevents civil actions against peace officers from being filed while criminal charges are pending against the potential plaintiff. The section also tolls the statute of limitations on the civil actions until the criminal charges are resolved. Relying on *Mangels v. City of Orange*, 678 F. Supp. 1452 (C.D. Cal. 1988), which held both parts of section 945.3 inapplicable to section 1983 claims, the district court found the tolling provision inapplicable to Harding's section 1983 claims. The court held that because the prohibitory provision of section 945.3 conflicted with the policies behind section 1983, Harding's claims were not tolled by section 945.3's tolling provision. We disagree. We hold that although section 945.3 may not prohibit a potential plaintiff from bringing a section 1983 claim against a peace officer while criminal actions are pending, section 945.3's tolling provision may still apply to toll the limitations period while criminal actions are pending against the potential plaintiff.

[3] Under the Supremacy Clause, U.S. Const. art. VI, cl. 6, " 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' " *Felder v. Casey*, 487 U.S. __, __, 108 S. Ct. 2302, 2306 (1988) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

In *Felder*, the Supreme Court held that a notice-of-claim provision, which was part of a broad legislative scheme gov-

---

[2]Section 945.3 provides in relevant part:

> No person charged by indictment, information, complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer . . . while the charges against the accused are pending before a justice, municipal, or superior court.
>
> Any applicable statute of limitations for filing and prosecuting these actions shall be tolled during the period that the charges are pending before a justice, municipal, or superior court.

erning Wisconsin's sovereign immunity, was preempted as inconsistent with the purpose and nature of section 1983 actions. The Court stated:

> In enacting section 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability . . . is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law.

Id. at 2314. Similarly, we conclude the provision of section 945.3, which absolutely prohibits a party from bringing a civil action against a peace officer while state criminal charges are pending against that party, is contrary to the purposes of section 1983. Accordingly, as applied here, the prohibition in paragraph one of section 945.3 must fall under the Supremacy Clause.

[4] Although section 945.3's prohibition on civil actions should not bar a party from bringing a section 1983 action while state criminal charges are pending, it does not necessarily follow that the one-year statute of limitation for section 1983 actions should not be tolled by the tolling rule expressed in section 945.3. Unlike the statute's prohibition on bringing section 1983 claims, the tolling rule is consistent with the objectives behind section 1983 actions. Therefore, the tolling provision does not fall under the Supremacy Clause and should have been applied to Harding's section 1983 claims against the Deputies.

In holding that federal courts should look to state law to determine the application of tolling rules, the Supreme Court stated that:

> [a]ny statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit

> inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interest in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival and questions of application.

Board of Regents v. Tomanio, 446 U.S. at 485-86 (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)). Here, the one-year limitation period applied to section 1983 claims in California is interrelated to the policies behind the tolling provision expressed in section 945.3.

The California legislature had two objectives in mind when it enacted section 945.3. The legislature prohibited actions against peace officers while criminal charges were pending to eliminate the use of civil damage complaints as plea bargaining levers. The legislature also sought to prevent the use of civil actions as a discovery device to inquire into prosecutorial information while the criminal charge is pending. *McMartin v. Los Angeles County*, 202 Cal. App. 3d 848, 855-56, 249 Cal. Rptr. 53, 55-56 (1988). Although, under the Supremacy Clause, these policies cannot be served by prohibiting a party from bringing a section 1983 claim, they can be served by tolling the statute of limitations in section 1983 claims when there are criminal charges pending against the potential plaintiff. On the other hand, a refusal to toll the period would ignore the state's policies and the interrelationship between the statute of limitations and the tolling provision.

Board of Regents v. Tomanio makes clear that the state tolling provision must be applied when it is not inconsistent with the Constitution or other federal law. *See Maurer v. Los Angeles County Sheriff's Dept.*, 691 F.2d 434, 436 (9th Cir. 1982). We find no inconsistency between the purposes of section

945.3's tolling provision and the policies behind section 1983. To the contrary, tolling the statute when criminal charges are pending against a potential litigant enhances the policies behind section 1983.

Tolling the statutory period while criminal actions are pending gives the party charged more time to file his section 1983 action. Striking down the tolling provision would force a party to defend a criminal action and prosecute a civil action during the same time period. Thus, application of the tolling provision increases a litigant's access to the courts. *Patsy v. Board of Regents,* 457 U.S. 496, 504 (1982) (in enacting section 1983, Congress intended to "throw open the doors of the United States Courts").

Second, there is no inconsistency between the purposes of section 945.3's tolling provision and the policies of deterrence and compensation embodied in section 1983. Indeed, giving a criminal defendant more time to file his section 1983 action would "ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages . . . ." *Felder,* 108 S. Ct. at 2307.

Third, since federal law requires this court to apply state tolling rules, application of section 945.3's tolling provision ensures consistent adjudication in state and federal courts. *Felder,* 108 S. Ct. at 2308-11.

Finally, and perhaps most importantly, while a state prohibition against filing an action cannot prohibit a criminal defendant from filing a section 1983 action against a peace officer while the criminal case is pending, section 945.3 should not be so applied as to force him to do so or lose his cause of action. The tolling period serves the independent policy objective of encouraging the criminal defendant to await the outcome of the criminal action before instituting a section 1983 action. In some cases the delay may result in the avoidance of unmeritorious actions that might otherwise be

costly to all concerned. At the same time, in other cases the delay may help render unnecessary the filing of meritorious actions, if the governmental entity is willing to settle the claim after a full exploration of the facts has occurred in a criminal proceeding.

III.

Under the Supremacy Clause, the prohibition in paragraph one of section 945.3 could not have prevented Harding from bringing his section 1983 claims against the Deputies while criminal charges were pending against him. However, the tolling provision in section 945.3 does not fall under the Supremacy Clause and, therefore, should be applied to Harding's claims. Because the statute of limitations on Harding's section 1983 claims was tolled while criminal charges were pending against him, his section 1983 claims were timely filed.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
JUN 28 1988
Clerk, U.S. District Court
Central District of California
By Deputy

ENTERED
Clerk, U.S. District Court
JUN 30 1988
Central District of California
By Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

EDWARD JOSEPH HARDING,
Plaintiff,
v.
DAVID GALCERAN, et al.,
Defendants.

NO. CV 87-2782 PAR (Tx)
MEMORANDUM OF DECISION AND ORDER

Plaintiff claims that defendants violated his first amendment and due process rights; jurisdiction is pursuant to 42 U.S.C. § 1983. The claims arise out of an incident at the San Dimas Sheriff Station in which plaintiff was "physically escorted" out of the building after arguing with a sheriff's deputy. Defendants now move for summary judgment.

Facts Not Genuinely Disputed

1. On October 19, [*sic*] 1984 plaintiff arrived at the San Dimas Sheriff Station at about 4:30 p.m. to help obtain the release on bail of his colleague Mr. Robert Peverly. Plaintiff spoke to defendant Galceran and became convinced that Galceran was not being as cooperative as possible. Edward Harding Decl. ¶¶ 1-8.

2. Approximately one-half hour later plaintiff, after speaking with defendant Galceran several times, in effect called defendant Galceran a moron: "You know, officer, your attitude reminds me of one of those moronic small town sheriffs that you see on T.V." *Id.* ¶ 22.

3. Plaintiff's version of what subsequently occurred is as follows: "Defendant Galceran jumped up and told me that I was going to leave. He ran around the counter and threw me into a hammerhock hold, propelled me across the lobby, shoved me through ther station doors and catapulted me off the station steps. I landed on the sidewalk on my hands and knees. He told me to get out of there and don't come back." *Id.* ¶ 23.

4. Another officer (defendant Teal), then came over to plaintiff and, according to plaintiff, "grabbed my lapels and ground his foot into my left toe like he was putting out a cigarette. He said, "You get out of here right now. Don't say another word." *Id.* ¶ 27.

5. About fifteen minutes after this incident plaintiff made two telephone calls to the station to complain about defendant's actions. He spoke first with defendant Chism and then spoke with the desk sergeant on duty, defendant Gingerich. In the first conversation plaintiff made several derogatory comments about defendant Galceran and defendant Gingerich hung up on plaintiff. Plaintiff immediately called back and asked about how he could file a complaint against defendant Galcerin and

Teal. He ultimately called Gingerich "a liar" and the conversation once again terminated. The parties do not dispute the basic content of the conversation. Edward Harding Decl. ¶ 29; Gingerich Decl. ¶¶ 4-15; Richard Harding Decl. Exhibit A (Edward Harding Depo.) at 116-17; Chism Decl. ¶¶ 7-13.

6. On October 11, 1984 a misdemeanor complaint was filed charging plaintiff with various violations of the California Penal Code. The charges were disturbing the peace, obstruction of a peace officer in performance of his duties, challenging a person in a public place to fight, and making annoying threatening telephone calls. Gingerich Decl. Exhibit B.

7. On May 2, 1986 plaintiff was acquitted.

8. The original master tape recording of plaintiff's telephone calls to the station after the incident no longer exists. A recording of the recording does exist. According to plaintiff, the existing tape differs from the original in that the first forty seconds of the original is lost and plaintiff's voice is "speeded up." Richard Harding Decl. ¶¶ 9-11, Exhibit A (Edward Harding Depo.) at 123-29.

9. Plaintiff's complaint in this action was filed May 1, 1987.

Facts Possibly Disputed, But That Are Not Material

1. Whether defendants destroyed evidence in an attempt to convict plaintiff of the misdemeanor offenses. Because the parties are in substantial agreement on what was said during plaintiff's two telephone calls to the station, and a copy of the tape was made and preserved by the defendants, and there is no evidence that the missing 40 seconds made any difference in the decision to prosecute or the prosecution, whether or not the master was destroyed does not appear in and of itself to create a triable issue of fact.

Standard

Fed. R. Civ. P. 56(b) provides that a defending party may move for summary judgment if the pleadings and supporting material "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment in favor of the defendant is therefore appropriate if plaintiff fails to: 1) produce evidence to support the existence of all essential elements on which plaintiff bears the burden of proof; and 2) show that all disputes about material facts or necessary inferences from the facts could reasonably be resolved in favor of either party by the trier of fact. *See, California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987); *Celotex Corp. v. Catrett*, __ U.S. __, 106 S. Ct. 2548, 3552-53 (1986); *Anderson v. Liberty Lobby, Inc.*, __ U.S. __, 106 S. Ct. 2505, 2511 (1986). *See generally*, Schwarzer, *Summary Judgment and Case Management*, 56 Antitrust Law Journal 213, 218 ("undisputed evidence submitted by a plaintiff may be insufficient to sustain a verdict which turns on a mixed question of law and fact under the applicable substantive law"). Defendants move for summary judgment on the grounds that the statute of limitations bars Counts one and two, and that Counts three and four are not cognizable under § 1983.

Statute of Limitations

Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) holds that the statute of limitations in § 1983 actions is the same as that for personal injury claims in the state in which the trial court sits. The relevant California statute is California Code of Civil Procedure § 340(3); it establishes a one year statute of limitations for personal injury actions. Because the

incident occurred prior to *Wilson* the cause of action accrued one year after the Wilson decison [*sic*]: April 17, 1986. *Cabrales v. County of Los Angeles*, 644 F. Supp. 1352, 1354 (C.D. Cal. 1986). The conspiracy claim in Count two accrued at the same time. Plaintiff's first two claims are therefore untimely because he did not commence his action until May 1, 1987.

Plaintiff argues, however, that the statute is tolled pursuant to Cal. Gov. Code § 945.3. This provision prevents claims against peace officers from being filed while criminal charges are pending against the potential plaintiff. It also provides that the statute of limitations on the civil claims is tolled until the criminal charges are resolved. Although the tolling of the statute of limitations in a § 1983 action is usually governed by state law, *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), the tolling provisions of Cal. Gov. Code § 945.3 do not apply because they would defeat substantive policy considerations underlying § 1983. *Mangels v. City of Orange*, 678 F.Supp. 1452 (C.D. Cal. 1988).[1] Plaintiff's first two claims therefore are barred by the statute of limitations.

Claims for malicious prosecution do not accrue until the party is found not guilty or is exonerated. *Cline v. Brusett*, 661 F.2d 108 (9th Cir. 1981). Counts three and four thus did not accrue until May 2, 1986. These claims are therefore timely.

Malicious Prosecution

Claims based on malicious prosecution are generally not cognizable under § 1983 if process is available

---

[1] Plaintiff at oral argument advanced several policy and doctrinal arguments for why the ruling in *Mangels* is mistaken. Even if these arguments were cogent, nothing in the record suggests that plaintiff's failure to advance his claims was caused by § 945.3.

within the state judicial system to provide a remedy; however, an exception exists when the prosecution is conducted with the intent to deprive a person of equal protection or is otherwise intended to effect a deprivation of constitutional rights. *Cline; Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985); *Usher v. City of Los Angeles*, 828 F.2d 556 (9th Cir. 1987). Plaintiff contends that his claim is cognizable because: 1) the criminal hearing was unfair; 2) the conduct of defendants was so "shocking" as to violate substantive due process; and 3) the intent of the prosecution was to deny plaintiff his First Amendment rights.

Current Ninth Circuit authority is not entirely clear as to when malicious prosecution claims based on a deprivation of due process are cognizable under § 1983. In both *Cline* and *Bretz* the plaintiff alleged that he was incarcerated because of a conspiracy that involved the bribery of witnesses, perjured testimony, and tampering with evidence. These allegations were sufficient to withstand a motion to dismiss. In contrast, in *Barker v. Johnson*, 799 F.2d 1396 (9th Cir. 1986), the court upheld summary judgment for defendants when plaintiff failed to allege either incarceration or that defendants had attempted to deny plaintiffs a fair trial. Plaintiffs did present evidence that baseless charges were brought against them for "political" reasons. The court held that this conduct did not "shock the conscience" and therefore did not violate substantive due process. *Id.* at 1400. It also held that there was no procedural due process violation in the absence of incarceration and tampering with evidence. The instant case presents an open situation in that plaintiff was not incarcerated, but he does allege that perjury and falsification of evidence occurred. Viewing the evidence in the light most favorable to plaintiff, and given that there is an allegation of tampering with the judicial process, the court cannot say

at this time that there was no violation of at least procedural due process.

Plaintiff must also allege a deprivation of a life, liberty, or property interest without due process of law to state a claim under the due process clause. *Id.* at 1399. Although plaintiff was not incarcerated, at oral argument his counsel stated that plaintiff had incurred legal fees in defending himself against the criminal charges and had also suffered mental anguish. The later loss does not appear to involve a liberty or a property interest, *Cf., Paul v. Davis*, 424 U.S. 693; 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (loss of reputation not a deprivation of a liberty or property interest); plaintiff cites no authority to the court which supports his view that it is. Attorney's fees might be cognizable under due process as a property loss, but in *Johnson* the court characterized the claims as alleging a deprivation of liberty and did not discuss any property loss. Nonetheless, *Johnson* did not explicitly hold that the payment of attorney's fees to defend against groundless charges is not a deprivation of property and defendants cite no authority for this proposition. The court notes, however, that if the attorney's fees are the basis of the deprivation then the damages in the case will not be high.

In *Usher v. City of Los Angeles*, 828 F.2d 556, 561-62 (9th Cir. 1986) the plaintiff alleged that defendants illegally arrested him, contrived charges to justify the arrest, submitted false police reports and initiated his criminal prosecution in bad faith; he also alleged that the police officers made racial slurs which demonstrated racial animus. The criminal proceeding against the plaintiff terminated in his favor. The § 1983 claim survived a motion to dismiss under the exception for a malicious prosecution intended to deny a person the equal protection of the laws.

Plaintiff here does not contend that the prosecution was intended to deny him equal protection, but does contend that his First Amendment rights were violated because the prosecution was in retaliation for his attempt, by telephone, to lodge complaints against defendants Galceran and Teal. Complaint ¶ 13. Numerous courts have held that access to the courts is protected by the petition clause of the First Amendment. *See, e.g., Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987); *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983); *Crews v. Petrosky*, 509 F. Supp. 1199 (W.D. Penn. 1981). There are two problems with plaintiff's argument. First in *Newton v. Rumery*, 480 U.S. __, 108 S.Ct. __, 94 L.Ed.2d (1987) the Supreme Court held that a release-dismissal agreement which dismissed criminal charges in exchange for a releasing the defendant's right to file an action under § 1983 was valid. *Newton* appears to overturn *MacDonald v. Musick*, 425 F.2d 373 (9th Cir. 1970) (stipulation that there was probable cause for arrest as condition to dismissal of drunk driving charge hampered plaintiff in asserting civil rights claim warranting habeas relief) and has uncertain implications for § 1983 actions based on a retaliatory prosecution. However, in *Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987) the court held that *Newton v. Rumery* does not bar § 1983 claims based on retaliatory filings. *Haynesworth* differs from the instant case in that in *Haynesworth* a policy of retaliatory filings was alleged; here there is only the allegation of a single filing.

Second, even assuming that an allegation of a single retaliatory filing is cognizable under § 1983, plainiff does not raise a triable issue of fact over this claim. To successfully prove a malicious prosecution claim against

the police officers, plaintiff must overcome the presumption that the prosecuting official exercised independent judgment that probable cause existed. *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981). The presumption may be overcome, for example, by showing that the officers pressured the district attorney so that his or her decision is not independent. *Smiddy* (dicta); *cf. Johnson v. Barker*, 799 F.2d at 1400 (pressure from the sheriff on the prosecutor to prosecute the plaintiffs was not cognizable under § 1983). In any event, there is no competent evidence to raise a triable issue of fact in this case that the district attorney's office was pressured into prosecuting plaintiff.[2]

Plaintiff can also rebut the presumption by showing that the officers presented evidence to the prosecutor that they knew to be false. *Smiddy* at 267. According to plaintiff, the officers distorted the evidence in the case by destroying the original tapes, altering the new tape, and submitting perjured testimony. This allegation does not raise a triable issue of fact. The officers are immune from § 1983 suits based on perjured testimony. *Briscoe v. Lahue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); *Holt v. Castaneda*, 832 F.2d 123 (9th Cir. 1987). To allow a malicious prosecution claim based on allegedly perjured testimony would in effect allow § 1983 actions against the precise conduct — perjured testimony — that *Briscoe* renders immune. It is unclear, however, whether this immunity applies to complaints that police officers file. The closest analogy to these complaints is testimony at probable cause hearings. As the court notes in *Holt*, the existence of immunity in these hearings is an open question. *Holt*, 832 F.2d at 127.

---

[2] Plaintiff's counsel's statements concerning the statements of the prosecutors he talked to are hearsay. Fed. R. Evid. 801 & 802. *See*, Richard Harding Decl. ¶ 26.

If this testimony does not give rise to liability, the only basis for the claim is the re-recording of the tape. Viewing the evidence in the light most favorable to plaintiff, the differences between the original tape and the tape available to the district attorney are minimal. According to plaintiff, approximately the first forty seconds (about two sentences) of the original tape were lost and his voice on the tape was distorted. Given that both parties are in general agreement as to the nature of the conversations, no trier of fact could reasonably find that these differences were the proximate cause of the district attorney's office decision to prosecute.

Attorney Testimony

Defendants argue that plaintiff's counsel should not be able to testify in the action and continue to represent plaintiff. *See, United States v. Clancy*, 276 F.2d 617, 636 (7th Cir. 1960), *rev'd on other grounds*, 365 U.S. 312 (1961). Plaintiff has not had an opportunity to repond in writing to this argument.

Conclusion

Plaintiff has until July 11, 1988 to brief the court on the following three issues:

1) Are the officers immune according to the rationale of *Briscoe* for statements made in the complaint?

2) What precisely is the competent evidence in the record that supports plaintiff's allegations of false evidence or testimony submitted to the district attorney that negate the presumption that the district attorney's decision to prosecute was independent?

3) Should the court prohibit plaintiff's counsel from testifying if he wishes to continue as counsel? If plaintiff must choose between striking counsel's testimony or obtaining new counsel, which would he prefer?

Defendants have until July 20, 1988 to reply.

DATED: June 28, 1988

/s/ Pamela Ann Rymer
Pamela Ann Rymer
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
SEP 2 1988
Clerk, U.S. District Court
Central District of California
By /s/ SR Deputy

ENTERED
Clerk, U.S. District Court
SEP 6 1988
Central District of California
By Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

EDWARD JOSEPH HARDING,
Plaintiff,
v.
DAVID GALCERAN, et al.,
Defendants.

No. CV 87-2782 PAR
MEMORANDUM OF DECISION AND ORDER

Plaintiff's complaint contains four counts alleging violation of his civil rights; jurisdiction is pursuant to § 1983. On June 30, 1988 the court granted summary judgment on two of the claims because they were barred by the relevant statute of limitations and requested further briefing on three issues[1] that arose from the last

---

[1] (1) Are the officers immune according to the rationale of *Briscoe* for statements made in the complaint? (2) What precisely is
(continued)

two counts. Counts three and four allege that the defendants maliciously prosecuted plaintiff and conspired to maliciously prosecute him. The parties have submitted papers on two of the three issues; the court now grants defendants' motion on the last two claims.

The second question posed to the parties stated:

> 2) What precisely is the competent evidence in the record that supports plaintiff's allegations of false evidence or testimony submitted to the district attorney that negate the presumption that the district attorney's decision to prosecute was independent?

Plaintiff does not address this issue explicitly, but does reiterate his belief that law enforcement officers generally push for the filing of baseless criminal charges against potential plaintiffs. This assertion is neither supported in the record, nor does it prove that the defendants so acted in this case.[2] Defendants counter that there is no competent evidence supporting plaintiff's malicious prosecution claims except for the testimony of two of the defendants at the trial — an activity for which they are immune from suit. None of the defendant

---

(ftn. continued)
the competent evidence in the record that supports plaintiff's allegations of false evidence or testimony submitted to the district attorney that negate the presumption that the district attorney's decision to prosecute was independent? (3) Should the court prohibit plaintiff's counsel from testifying if he wishes to continue as counsel? If plaintiff must choose between striking counsel's testimony or obtaining new counsel, which would he prefer?

[2] To the extent that plaintiff's assertion is true, the rule adopted by this court in *Mangels v. City of Orange*, 678 F.Supp. 1452 (C.D. Cal. 1988) should have a salutory effect by preserving the availability of a federal forum for the vindication of accused citizen's civil rights.

officers signed the complaint. Motion Exhibit B. Under these circumstances, plaintiff has failed to carry his burden under *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986); *Matsushita v. Zenith Radio*, 475 U.S. 574, 89 L.Ed.2d 538, 106 S.Ct. 1548 (1986), that the decision of the prosecutor was not independent. Given this determination, the court does not reach any other outstanding issues.

DATED: August 31, 1988

/s/ Pamela Ann Rymer
Pamela Ann Rymer
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No. CV87-2782-PAR Date October 16, 1987
Title Edward Joseph Harding v. David Galceran, et al.

DOCKET ENTRY

PRESENT:
HON. Pamela Ann Rymer , JUDGE

Deputy Clerk Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
Richard C. Harding
(818) 304-0320

ATTORNEYS PRESENT FOR DEFENDANTS:
Gordon W. Trask
974-1948

PROCEEDINGS: STATUS CONFERENCE. Court and counsel having conferred and counsel having agreed that the following schedule is reasonable in light of the issues in dispute in the case, IT IS ORDERED:

(___) Court Order to be prepared by counsel.

(___) Further status conference set for _____
a.m. by telephone
at ___ p.m. in Chambers

(___) Unserved parties to be dismissed by _____.

(X) Discovery cut-off set for 3/31/88 .

(___) Law and motion cut-off set for _____.

(___) Settlement conference set before Judge Rymer on
a.m.
_____ at ___ p.m.

(X) Pre-trial conference set for 5/9/88 at 3:00 p.m.

Jury (√) Court (___) trial set for 5/24/88 at 9:00 a.m.

(Estimated trial length _____ days).

Counsel for Π agrees that all claims are §1983 claims, and that no claims are either pendent state law claims or §1985 claims.

/s/ PAR

cc: All counsel

Initials of Deputy Clerk ____

MINUTES FORM 11
CIVIL — GEN D — M

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
FEB 14 1990
Cathy A. Catterson, Clerk
U.S. Court Of Appeals

EDWARD JOSEPH HARDING,
Plaintiff-Appellant,
v.
DAVID GALCERAN; TERRY GINGERICH; LAWRENCE MOSER; JAMES D. CHISIM, [*sic*] et al.,
Defendants-Appellees.

No. 88-6484
D.C. No. CV-87-2782-PAR

ORDER
Appeal from the United States District Court
for the Central District of California

Before: HUG, FARRIS, and REINHARDT,
Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on it. Fed R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

THE CIVIL RIGHTS ACT OF 1871, 42 U.S.C. SECTION 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

THE CIVIL RIGHTS ACT OF 1866, 42 U.S.C. SECTION 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

APPENDIX E

CALIFORNIA TORT CLAIMS ACT OF 1963, CALIFORNIA GOVERNMENT CODE SECTION 945.3

No person charged by indictment, information, complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing a peace officer based upon conduct of the peace officer relating to the offense for which the accused is charged, including an act or omission in investigating or reporting the offense or arresting or detaining the accused, while the charges against the accused are pending before a justice, municipal, or superior court.

Any applicable statute of limitations for filing and prosecuting these actions shall be tolled during the period that the charges are pending before a justice, municipal, or superior court.

For the purposes of this section, charges pending before a justice, municipal, or superior court do not include appeals or criminal proceedings diverted pursuant to Chapter 2.5 (commencing with Section 1000), Chapter 2.6 (commencing with Section 1000.6), Chapter 2.7 (commencing with Section 1001), Chapter 2.8 (commencing with Section 1001.20), or Chapter 2.9 (commencing with Section 1001.50) of Title 6 of Part 2 of the Penal Code.

Nothing in this section shall prohibit the filing of a claim with the board of a public entity, and this section shall not extend the time within which a claim is required to be presented pursuant to Section 911.2.

APPENDIX F

CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 340

Within one year:

(1) An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.

(2) An action upon a statute for a forfeiture or penalty to the people of this state.

(3) An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Section 4826 of the Business and Professions Code, for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl.

(4) An action against an officer to recover damages for the seizure of any property for a statutory forfeiture to the state, or for the detention of, or injury to property so seized, or for damages done to any person in making any such seizure.

(5) An action by a good faith improver for relief under Chapter 10 (commencing with Section 871.1) of Title 10 of Part 2 of the Code of Civil Procedure. The time begins to run from the date upon which the good faith improver discovers that the good faith improver is not the owner of the land upon which the improvements have been made.